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IN THE

Supreme Court of the United States

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.,
PETITIONER,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT,

and

STATE OIL AND GAS BOARD OF ALABAMA,
INTERVENOR.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The Legal Environmental Assistance Foundation, Inc. is a non-profit corporation. It has no parent corporation and no stock.

TABLE OF CONTENTS

Page

Compelling Reasons Support Granting the Petition 1

The United States Court of Appeals erred in affirming the U.S. Environmental Protection Agency's approval of Alabama's revised underground injection control program pursuant to 42 U.S.C. § 300h-4 3

State underground injection control programs approved under 42 U.S.C. § 300h-4 must still meet the requirements of 42 U.S.C. § 300h(b)(1)(B) 8

Remand by the Court of Appeals does not preclude certiorari review by the Supreme Court ... 9

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464 (1947) .. 9

American Textile Manufacturers Inst. v. Donovan, 452 U.S. 490 (1981) 7

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) 3, 8

Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 7

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 3, 8

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 3, 7, 8

SEC v. Chenery, 332 U.S. 194 (1947) 7

Statutes:

5 U.S.C. § 706(2)(a) 3, 8

28 U.S.C. § 1254 9

42 U.S.C. § 300h-4 ..... 2, 3, 8, 9, 10

42 U.S.C. § 300h(b)(1) 9, 10

42 U.S.C. § 300h(b)(1)(B) 6, 8, 9

42 U.S.C. § 300h(b)(1)(B)(i) 2, 3, 6-8, 10

42 U.S.C. § 300h(d)(2) 2, 3, 5, 8, 10

Code of Federal Regulations:

40 C.F.R. Part 141 Subparts B and G 5

40 C.F.R. Part 145 ..... 9, 10

Federal Register:

65 Fed. Reg. 2889 (2000) 4, 5, 7

Miscellaneous:

Sup. Ct. R. 10 1

Ala. Admin. Code R. 400-4-5-.04(2)
[now R. 400-3-8-.03(2)] 6

Ala. Admin. Code R. 400-4-5-.04(4)
[now R. 400-3-8-.03(5)] 6

Ala. Admin. Code R. 400-3-8-.03(6) 7

Ala. Admin. Code R. 400-3-8-.03(6)(a)(2) 7

Ala. Admin. Code R. 400-3-8-.03(6)(a)(5) 7

Ala. Admin. Code R. 400-3-8-.03(6)(d) 7

Ala. Admin. Code R. 400-3-8-.03(7) 7

H. Rep. No. 93-1185, 93rd Cong., 2d Sess. (1974),
reprinted in 1974 U.S.C.C.A.N. 6454 ..... 6, 7

Bureau of Land Management, Notice of Availability
of Draft Environmental Impact Statement, 67 Fed.
Reg. 6943 (2002) 2

Bureau of Land Management, Notice of Availability
of Draft Environmental Impact Statement, 67 Fed.
Reg. 1497 (2002) 2

COMPELLING REASONS SUPPORT GRANTING THE PETITION

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Among them are when the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court and when the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power. Id. Moreover, the reasons identified in Rule 10 are neither controlling nor do they express the full measure of the Court's discretion to grant a writ of certiorari.

In this case, the Court of Appeals decided an important question of federal law that has not been, but should be, settled by the Supreme Court. That question is whether, contrary to the Safe Drinking Water Act, the U.S. Environmental Protection Agency may approve a state underground injection control program where such program does not provide that well operators must satisfy the State that their proposed injection of fluids will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons.

There were over 10,000 coalbed methane wells operating in the United States in 1998.[1] The number of coalbed methane wells projected to become operational during the next ten years has increased tremendously.

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[1] Survey Results on Inventory and Extent of Hydraulic Fracturing in Coalbed Methane Wells in the Producing States, Ground Water Protection Council (Dec. 15, 1998) attached to State Oil and Gas Board of Alabama Comments (Nov. 22, 1999).

See e.g., Bureau of Land Management, Notice of Availability of Draft Environmental Impact Statement, 67 Fed. Reg. 6943 (2002) (10,000 wells in the Montana portion of the Powder River Basin); Bureau of Land Management, Notice of Availability of Draft Environmental Impact Statement, 67 Fed. Reg. 1497, 1498 (2002) (51,000 wells in the Wyoming portion of the Powder River Basin). Many of these injection wells permit injection directly into underground sources of drinking water. EPA has approved underground injection control programs in 44 states and territories, including 23 Class II (oil and gas related) underground injection control programs approved under 42 U.S.C. § 300h-4. The national importance of EPA's proper implementation of the Safe Drinking Water Act to the health of the public is obvious. The national importance of EPA's implementation of the Safe Drinking Water Act vis-a-vis the hydraulic fracturing activities of the oil and gas industry is also illustrated by the proposed *Amici*'s interest in this case.

In addition, the Court of Appeals' decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power. The Safe Drinking Water Act requires that State underground injection control programs, even programs developed and approved under 42 U.S.C. § 300h-4, must require that persons proposing to inject fluids must satisfy the State that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. 42 U.S.C. §§ 300h(b)(1)(B)(i), 300h(d)(2). EPA approved Alabama's underground injection control program without such a requirement. The Court of Appeals affirmed summarily, departing from the settled

requirements of 5 U.S.C. § 706(2)(a). *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary if it fails to consider the relevant factors or an important aspect of the problem); *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (same); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (same).

Finally, this is not a case where the Petitioner asserts error consisting of erroneous factual findings or the misapplication of a properly stated rule of law. Rather, the error asserted by Petitioner is the complete failure of the Court of Appeals to apply the law and the complete failure of the EPA to consider a relevant factor in its approval of Alabama's program.

The United States Court of Appeals erred in affirming the U.S. Environmental Protection Agency's approval of Alabama's revised underground injection control program pursuant to 42 U.S.C. § 300h-4.

The Safe Drinking Water Act requires that state underground injection control programs, even oil and gas related programs developed and approved under 42 U.S.C. § 300h-4, must require that persons proposing to inject fluids must satisfy the state that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. 42 U.S.C. §§ 300h(b)(1)(B)(i), 300h(d)(2). In its approval of Alabama's underground injection control program, EPA explained its consideration of 42 U.S.C. § 300h(b)(1)(B)(i) as follows:

> Section 1421(b)(1)(B)(i) [42 U.S.C. § 300h(b)(1)(B)(i)] is satisfied because, while the Alabama regulation does not establish a permit requirement, Rule 400-4-5-.04(4) [now R. 400-3-8-.03(5)] states: "Coal beds shall not be hydraulically fractured until the written approval of the Supervisor is obtained."

65 Fed. Reg. 2889, 2894 (2000). This mere prohibition against unpermitted injection does not address the statutory requirement that persons proposing to inject fluids must satisfy the state that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. Thus, it does not rationally support the approval of Alabama's program.

Elsewhere in its approval of Alabama's program, EPA identified the well operator's demonstration burden as follows:

> The State has also adopted additional regulatory provisions preventing underground injection which endangers drinking water sources. State Rule 400-4-5-.04(3) [now R. 400-3-8-.03(3)] states: "The operator shall certify in writing to the Supervisor that the proposed fracturing operation will not occur in a USDW. Evidence that supports how the determination was made shall accompany such certification and be acceptable to the Supervisor. Otherwise, the operator shall certify in writing to the Supervisor that the mixture of fluids to be used to hydraulically fracture the coal beds does not exceed the maximum contaminant levels contained in 40 CFR § 141 Subparts B and G."

> This provision requires a certification that fracturing fluids will not be injected into a USDW or establishes specifications for the quality of the injectate should the injection occur into the USDW. Specifically, it states that the injectate must meet drinking water standards. Therefore, EPA concludes that adequate provisions have been established to prevent endangerment of drinking water sources from hydraulic fracturing operations.

65 Fed. Reg. at 2894-95. Obviously, this demonstration burden is insufficient because it fails to address whether the proposed injection may result in the presence of any contaminant in underground sources of drinking water *which may adversely affect the health of persons. See* 42 U.S.C. § 300h(d)(2). The House Interstate and Foreign Commerce Committee unambiguously rejected the maximum contaminant levels contained in 40 C.F.R. Part 141 Subparts B and G as the sole and sufficient measure of ensuring the protection of human health. The Committee said:

> The Committee was concerned that its definition of 'endangering drinking water sources' also be construed liberally. Injection which causes or increases contamination of such sources may fall within this definition even if the amount of contaminant which may enter the water source would not by itself cause the maximum allowable levels to be exceeded. The definition would be met if injected material were not completely contained within the well, if it may enter either a present or potential drinking water source, and if it (or some form into which it might be converted) may pose a threat to human health or

> render the water source unfit for human consumption.

H. Rep. No. 93-1185, 93rd Cong., 2d Sess. 32, *reprinted in* 1974 U.S.C.C.A.N. 6454, 6484.

EPA, the State Oil and Gas Board of Alabama, and the proposed *Amici* suggest that there are provisions in Alabama's program other than Rule 400-4-5-.04(4) [now R. 400-3-8-.03(5)] which support EPA's finding that the requirements of 42 U.S.C. § 300h(b)(1)(B)(i) are satisfied. For example, they suggest that R. 400-4-5-.04(2) [now R. 400-3-8-.03(2)] satisfies the statutory requirement that persons proposing to inject fluids must satisfy the state that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. This rule however, merely says that "[c]oal beds shall not be hydraulically fractured in a manner that allows the movement of fluid containing any contaminant into a USDW, if the presence of that contaminant may . . . adversely affect the health of persons." The rule does not require that the person proposing to inject fluids must *satisfy the State* that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons *prior to* obtaining approval to inject. 42 U.S.C. § 300h(b)(1)(B) was discussed in the Report of the House Interstate and Foreign Commerce Committee:

> The Administrator's guidelines for State underground injection control programs must, as a minimum, require States to . . . require applicants for underground injection permits to bear the burden of proving to the State that its

> injection will not endanger drinking water sources; . . ..

H.R. Rep. No. 93-1185, 93rd Cong., 2nd Sess. 28 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6481.

EPA, the State Oil and Gas Board of Alabama, and the proposed *Amici* also suggest that R. 400-3-8-.03(6)(a)(2) (construction standards), 400-3-8-.03(7) (record keeping requirements), 400-3-8-.03(6)(a)(5) (movement into overlying strata), 400-3-8-.03(6)(d) (progressively stricter standards), 400-3-8-.03(6) (additional information may be required) support the EPA's determination that the Alabama program satisfies the requirement of 42 U.S.C. § 300h(b)(1)(B)(i). Not only do these rules not support a finding that the Alabama program requires that the person proposing to inject fluids must *satisfy the State* that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons *prior to* obtaining approval to inject, but the EPA did not rely on them to demonstrate satisfaction of the requirements of 42 U.S.C. § 300h(b)(1)(B)(i). *See* 65 Fed. Reg. at 2894 ("Section 1421(b)(1)(B)(i) is satisfied [by] Rule 400-4-5-.04(2) [now R. 400-3-8-.03(2)]"). "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery*, 332 U.S. 194, 196 (1947); *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490, 539 (1981)). "[T]he courts may not accept appellate counsel's post hoc rationalizations for agency action." *Id.* (citing *Burlington Truck Lines*, 371 U.S. at 168).

The Safe Drinking Water Act requires that State underground injection control programs, including programs developed and approved under 42 U.S.C. § 300h-4, must require that persons proposing to inject fluids must satisfy the state that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. 42 U.S.C. §§ 300h(b)(1)(B)(i), 300h(d)(2). EPA approved Alabama's underground injection control program without such a requirement. The Court of Appeals erroneously affirmed EPA's arbitrary approval. 5 U.S.C. § 706(2)(a). *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary if it fails to consider the relevant factors or an important aspect of the problem); *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (same); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (same). Accordingly, the Court of Appeals decision should be reversed.

STATE UNDERGROUND INJECTION CONTROL PROGRAMS APPROVED UNDER 42 U.S.C. § 300h-4 MUST STILL MEET THE REQUIREMENTS OF 42 U.S.C. § 300h(b)(1)(B).

The State Oil and Gas Board of Alabama and proposed *Amici* suggest that the increased flexibility allowed by 42 U.S.C. § 300h-4 for oil and gas related underground injection control programs authorizes states to deviate from the requirements of 42 U.S.C. § 300h(b)(1)(B) and to develop programs which contain provisions that are an effective alternative to the requirements of 42 U.S.C. § 300h(b)(1)(B). This is simply not true.

42 U.S.C. § 300h-4 provides that "in lieu of the showing required under subparagraph (A) of section 300h-1(b)(1) of this title the State may demonstrate that such portion of the State program *meets the requirements of subparagraphs (A) through (D) of section 300h(b)(1)* of this title and represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources." (Emphasis added). Thus, the plain language of 42 U.S.C. § 300h-4 allows states flexibility to develop effective programs without having to meet all of the EPA regulations which would otherwise be applicable, 40 C.F.R. Part 145, but retains as minimum requirements subparagraphs (A) through (D) of 42 U.S.C. § 300h(b)(1), including the requirement that persons proposing to inject fluids must *satisfy the state* that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons *prior to* obtaining approval to inject. 42 U.S.C. § 300h(b)(1)(B). Accordingly, despite that a state program is developed and approved under 42 U.S.C. § 300h-4, such program must still meet the requirements of 42 U.S.C. § 300h(b)(1)(B).

REMAND BY THE COURT OF APPEALS DOES NOT PRECLUDE CERTIORARI REVIEW BY THE SUPREME COURT.

28 U.S.C. § 1254 does not impose restrictions on when the Supreme Court may review a case in the Court of Appeals. *E.g., Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947)(remand or issuance of mandate does not preclude review).

The Court of Appeals' remand of the EPA's determination that coalbed methane wells are "Class II-like" wells rather than "Class II" wells is likely to have no impact on the Agency's determination that the Alabama underground injection control program "meets the requirements of subparagraphs (A) through (D) of section 300h(b)(1) of this title and represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h-4. The "Class II-like" and "Class II" distinction was only relevant if Alabama could not take advantage of 42 U.S.C. § 300h-4 and had to comply with all the requirements for Class II wells in 40 C.F.R. Part 145. The Court of Appeals decided adversely to Petitioner on this issue and Petitioner has not sought review of this issue here.

CONCLUSION

The Court of Civil Appeals erred in affirming EPA's approval of Alabama's revised Class II UIC program. EPA's approval is arbitrary because EPA failed to require that coalbed methane well operators satisfy the State that their proposed injection of hydraulic fracturing fluids will not result in the presence of any contaminant in underground sources of drinking water which *may adversely affect the health of persons* as required by 42 U.S.C. §§ 300h(b)(1)(B)(i) and 300h(d)(2). Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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